In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1012

HUNTSVILLE BOARD OF EDUCATION, ET AL., PETITIONERS

v.

SONNIE WELLINGTON HEREFORD, IV, ET AL.,
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 504 F. 2d 857. The findings of fact and conclusions of law of the district court (Pet. App. A8-A13) and its decree (Pet. App. A4-A8) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1974. The petition for a writ of certiorari was filed on February 13, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a school board operating a dual school system has sustained its burden of converting to a unitary system when there exists within the school system an identifiably black elementary school that could be paired or grouped with several nearby predominantly white elementary schools.

STATEMENT

This school desegregation case was filed by black children and their parents on March 11, 1963. The district court entered an order requiring the desegregation of the Huntsville public school system and directing petitioners to submit to the court a desegregation plan to be implemented for the second term of the 1963-1964 school year. In its findings of fact and conclusions of law, the court stated that prior to *Brown* v. *Board of Education*, 347 U.S. 483, the Huntsville school system was a dual system pursuant to the laws of Alabama and that subsequent to the *Brown* decision no steps had been taken by petitioners to convert the dual system into a unitary system. After several years of litigation concerning the desegregation plan, the final plan was approved by the court of appeals in 1971 in *Hereford* v. *Huntsville Board of Education*, 448 F. 2d 784 (C.A. 5) (Pet. App. A1).

On May 16, 1974, petitioners filed in the district court a motion seeking approval of certain changes in the desegregation plan (*id.* at A8). The United States, as plaintiff-intervenor, objected to the continuation under the new plan of the disproportionate concentration of black students at Cavalry Hill Elementary School (*ibid.*).[1] The district court ordered the School Board to prepare and file a report concerning alternative methods of student assignment for Cavalry Hill School (*ibid.*). In July 1974, the court held a hearing on the petition and report of the School Board (*id.* at A9).

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[1]The United States also objected to the assignment plan with respect to the Terry Heights and Roy Stone schools. The petition presents no issue concerning those schools.

The district court found that in September 1973 there were 34,181 students in the Huntsville school system of whom 5,793, or 16.95 percent, were non-white (*id.* at A9, A14). Of the 623 students enrolled at Cavalry Hill in September 1973, only 25, or 4.01 percent, were white (*id.* at A10, A14). The court also found that in September 1970 Cavalry Hill had an enrollment of 960, with only two whites; and in June 1972 it had an enrollment of 730 with only 55 whites (*id.* at A10). Despite these statistics, the court concluded that Cavalry Hill "is now desegregated" (*ibid.*).

The court attributed the high percentage of black students at Cavalry Hill to its location in a predominantly black housing project and to white flight; it was "not for the lack of a good faith effort on the part of the Huntsville Board of Education" (*id.* at A11). The court rejected the recommendation of the United States that Cavalry Hill be paired or grouped with several predominantly white elementary schools located within two or three miles of Cavalry Hill (*id.* at A12). The court stated that "the prospects would appear to be dim" that white students would attend Cavalry Hill if it were grouped or paired with other schools and that pairing or grouping "could well disrupt the progress already achieved in the desegregation of the system and the schools involved" (*id.* at A13).

The court of appeals reversed the district court's order with respect to Cavalry Hill School (*id.* at A1-A3). The court stated that, although the desegregation plan it had approved in 1971 projected Cavalry Hill to be 67.6 percent black, with 765 black students and 367 white

students, "[t]he white students have never attended" (*id.* at A3). In addition to the recent attendance figures cited by the district court, the court of appeals noted that in September 1974 there were 368 black students and only 15 white students at Cavalry Hill (*ibid.*). It held that "[t]he district court should have required that the school board modify the student assignment plan to desegregate Calvary [*sic*] Hill school," because "this school has never been desegregated" (*ibid.*). The court of appeals ordered the district court to follow the method of desegregation set out in *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142 (C.A. 5) (*en banc*), certiorari denied, 413 U.S. 920.

ARGUMENT

As a school board operating a dual system at the time of *Brown* v. *Board of Education, supra*, the Huntsville Board of Education was charged with the affirmative duty to take whatever steps might be necessary to convert a unitary system in which racial discrimination would be eliminated "root and branch." *Green* v. *County School Board*, 391 U.S. 430, 438; *Swann* v. *Board of Education*, 402 U.S. 1. The record indicates that the Huntsville Board of Education has not completed its affirmative duty to desegregate its school system. Cavalry Hill School has never been desegregated. This school has never had more than 7.44 percent white students and has remained identifiably black throughout its history. Although *Swann* v. *Board of Education, supra*, acknowledges that one-race, or virtually one-race, schools may be constitutionally permissible, Cavalry Hill is not the type of school envisioned in that case. Cavalry Hill is within 2 or 3 miles of several predominantly white elementary schools with which pairing or grouping would be relatively simple.

The district court declined to order the pairing or grouping of schools because it believed that white students would not attend Cavalry Hill. However, fear of white flight "cannot * * * be accepted as a reason for achieving anything less than complete uprooting of the dual public school system." *United States* v. *Scotland Neck Board of Education,* 407 U.S. 484, 491. The district court's finding that the pairing or grouping of schools "could well disrupt the progress already achieved in the desegregation of the system" (Pet. App. A13) is speculative and similarly is not a justification for achieving less than the complete desegregation of the school system.

The district court found that the Huntsville Board of Education had made good faith efforts to desegregate its school system. However, in order to sustain its burden in this case, the Board had to show that its past segregative acts did not create or contribute to the current segregated condition of Cavalry Hill School. *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189. The Board made no such showing here. On the contrary, the record indicates that the current segregated condition of Cavalry Hill, which has remained an identifiably black school throughout its history, results from past segregative acts by the Huntsville Board of Education.

The decision of the court of appeals, requiring petitioner to eliminate all vestiges of state-imposed segregation, is fully consistent with other decisions of that court which have required revisions in student assignment plans if an interim plan has proved ineffectual. See, *e.g.*, *Ellis* v. *Board of Public Instruction of Orange County,*

Florida, 465 F.2d 878 (C.A. 5), certiorari denied, 410 U.S. 966; *Weaver* v. *Board of Public Instruction of Brevard County, Florida*, 467 F.2d 473 (C.A. 5), certiorari denied, 410 U.S. 982. Further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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